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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 MICHAEL C. BAUERLEIN, surviving
9 natural father of BROOKE LYNNE
10 BAUERLEIN, deceased minor,
11 individually and on behalf of all wrongful
12 death beneficiaries, including SHANNON
13 BAUERLEIN, surviving mother of
14 BROOKE LYNNE BAUERLEIN,
15 deceased minor; and PATRICIA JOELEE
16 BAUERLEIN, through MICHEAL C.
17 BAUERLEIN, her natural parent and
18 next friend,

19 Plaintiffs,

20 v.

21 EQUITY RESIDENTIAL PROPERTIES
22 MANAGEMENT CORPORATION, an
23 Illinois Corporation d/b/a LA
24 MARIPOSA; LOTUS & WINDOWARE,
25 INC., a California Corporation; JUMBO
26 SURPLUS CORPORATION, a
Taiwanese Corporation; JOHN and JANE
DOES I-X; and BLACK and WHITE
CORPORATIONS/ PARTNERSHIPS I-
X,

Defendants.

NO. CV04-1904-PHX-SMM

ORDER

24 Pending before the Court is Defendant/Cross-Defendant/Cross-Claimant Jumbo
25 Surplus Corporation's (Jumbo") Motion for Leave to Amend its Affirmative Defenses
26

(Doc. 190). Jumbo seeks to amend its Amended Answer to the Second Amended Complaint and Affirmative Defenses to add the following affirmative defenses:

- 25. As an affirmative defense, Defendant alleges that this Court does not have personal jurisdiction over Jumbo.**
- 29. As an affirmative defense, Defendant alleges that it is not liable to the Plaintiffs in this matter as Jumbo's manner of work with regard to the subject product was done strictly in compliance with specifications provided by other entities and by this following of specifications, Jumbo is not liable to Plaintiffs.**
- 30. As an affirmative defense, Defendant alleges, pursuant to A.R.S. § 12-551 and all applicable or related statutes of repose and limitation, that Plaintiffs' action is barred by the statute of limitations.**

Proposed Second Amended Answer (Doc. 190-2).

On July 7, 2005, Plaintiff was granted leave to file its Second Amended Complaint in this action wherein Plaintiff named Jumbo as a Defendant, among other Defendants in the wrongful death claim of Brooke Bauerlein. According to the record, Plaintiff first attempted service on Jumbo pursuant to Fed.R.Civ.P.4, however Jumbo did not voluntarily appear.¹ Thereafter, on December 8, 2006, after obtaining international service on Jumbo, Jumbo filed its Answer and affirmative defenses. (Doc. 160). Jumbo's Answer did not raise the defense of lack of personal jurisdiction. Nor did Jumbo raise the defense of lack of personal jurisdiction at that time by filing a motion pursuant to Fed.R.Civ.P.12. (Doc. 160). On December 20, Jumbo filed an Amended Answer without Motion for Leave. Once again, Jumbo did not raise the defense of lack of personal jurisdiction. (Doc. 165). On March 27, more than three months subsequent to filing its Amended Answer, Jumbo filed the pending motion seeking leave to amend

¹ A copy of the letter and proof of receipt is included in the record.

1 its Answer. An objection to personal jurisdiction must be raised as an affirmative
2 defense in the Answer or by motion prior to the filing of the Answer.
3 Fed.R.Civ.P.12(b). Consequently, permitting Jumbo to amend its Answer to add the
4 affirmative defense of lack of personal jurisdiction when Jumbo failed to raise the
5 defense in a pre-Answer motion or its first responsive pleading, would contravene the
6 Federal Rules of Civil Procedure and effectively render Fed.R.Civ.P. 12(h) as it relates
7 to personal jurisdiction meaningless.²
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10 Therefore, Jumbo's Motion for Leave to Amend (Doc. 190) as it pertains to the
11 affirmative defense of lack of personal jurisdiction (paragraph 25) is **DENIED**.

12 As to Jumbo's request to add affirmative defenses paragraphs 29 and 30, the Court
13 finds no objection with this request. Rule 15(a) provides that "leave will be freely given
14 when justice requires". In its opposition, Plaintiff raised no objection with regard to
15 Jumbo's proposed affirmative defenses paragraphs 29 and 30. Therefore, the Court finds
16 that justice requires the Court to **GRANT** Jumbo's Motion for Leave to Amend (Doc.
17 190) as it pertains to paragraphs 29 and 30.
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20 Accordingly,

21 **IT IS HEREBY ORDERED** that Jumbo's Motion for Leave to Amend its

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23 ² Furthermore, the Court finds that Jumbo waived the defense of lack of personal
24 jurisdiction by making an appearance in the case. Defendants can waive the defect of
25 lack of personal jurisdiction by appearing generally without first challenging the defect
26 in a preliminary motion. *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982)(*citing Amen v. Dearborn*, 532 F.2d 554, 558, n.7 (6th Cir. 1976))(Jurisdiction attaches if a defendant makes a voluntary general appearance, as by filing an answer through an attorney).

1 Affirmative Defenses (Doc. 190) is **DENIED** in part and **GRANTED** in part.

2 **IT IS FURTHER ORDERED GRANTING** Jumbo's Motion for Leave to
3 Amend its Affirmative Defenses (Doc. 190) as to paragraphs 29 and 30 of Jumbo's
4 proposed Second Amended Answer to Plaintiffs' Second Amended Complaint (Doc.
5 190-2).
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7 **IT IS FURTHER ORDERED DENYING** Jumbo's Motion for Leave to Amend
8 its Affirmative Defenses (Doc. 190) as to paragraph 25 of Jumbo's proposed Second
9 Amended Answer to Plaintiffs' Second Amended Complaint (Doc. 190-2).
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11 DATED this 2nd day of April, 2007.
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17 Stephen M. McNamee
18 United States District Judge
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